The

BAR ASSOCIATION BULLETIN

Entered as second-class matter, April 13, 1926, at the Postoffice at Los Angeles, California, under the Act of March 3, 1879

Volume 3, Number 16 APRIL 19, 1928 5c a copy: $1 a year

Official Publication of the Los Angeles Bar Association, Los Angeles, Cal.

In This Issue

MONTHLY MEETING OF ASSOCIATION
Thursday, April 19, 1928
See Page 22 for Particulars

Printed by PARKER, STONE & BAIRD COMPANY
Law Printers and Engravers
241 East Fourth Street Los Angeles, California

The BAR ASSOCIATION BULLETIN

Vol. 3 APRIL 19, 1928 No. 16

Published the first and third Thursdays of each month by the Los Angeles Bar Association and devoted to the interests of the Association.

Office: 535 Title Insurance Building, Los Angeles
Fifth and Spring Streets
Telephone MEtropolitan 2000, Station 162

LOS ANGELES BAR ASSOCIATION

(City and County—Organized 1888)

Reforms in the Law of Evidence

By EARLE K. STANTON *of the Los Angeles Bar; Professor of Law, Southwestern University.*

The idea of any reform is particularly distasteful to the conservative mind, and if there is any class of individuals more conservative by nature and education than the lawyer, it is unknown to the writer. The lawyer is trained to follow in the footsteps of his predecessors. The judge must follow the precedents laid down by the higher court. And so it comes about that rather than tamper with the time honored machinery of the law we endure the grinding creaks of wheels which have long since served their legitimate purposes and which now merely serve to bring the law, the courts and the lawyer into public disrepute. And in no other phase of the law is this legal conservatism more pronounced than in the rules of evidence which have been handed down to us from time immemorial.

However, in 1920 the Commonwealth Fund of New York City appropriated adequate sums for the encouragement of legal research and it was found that one of the subjects demanding immediate consideration was that of reforms in the law of evidence.

The idea was not to advocate, by propaganda, revolutionary changes in the present rules, but by a careful study of conditions to recommend a few fundamental, yet specific alterations, which could be adopted without completely overthrowing the great bulwark of the law-precedent.

Prof. John H. Wigmore, probably the greatest living authority of the law of evidence, Judge Chas. M. Hough, of the Circuit Court of Appeals, Chief Justice Wm. A. Johnson, of the Supreme Court of Kansas, and six law teachers from Yale, Harvard, Columbia, Chicago and Michigan, were members of the committee appointed to carry on the work. Thus the judicial and the pedagogical viewpoints, the practical and the theoretical aspects were merged in a sincere effort to bring some order out of chaos.

For a period of nearly five years, this committee gathered material, sent out questionnaires, considered the traditions, education and customs affecting this important phase of the law and finally in 1927 made public a report, conservative in the extreme, yet, for that very reason, worthy of profound consideration.

As stated in the report, the committee "was met with the suggestion of a single reform, namely, to *abolish all rules which forbid the reception of any relevant evidence.*" But this suggestion was far too radical, too impossible of enforcement, and also too indefinite.

While the object sought after by all rules of evidence should be the establishment of the truth, yet it must be an orderly and systematic inquiry, for the lawyer, be he judge, instructor or practitioner, is a methodical and cautious creature and revolutionary ideas do not, as a rule, appeal to him.

Wigmore, himself a reformer of no little virility, says, "Our system of evidence is sound on the whole." And again he states, "The way we abuse the rules is one thing, but the rules themselves are quite a different thing." Neither by abolishing the bulk of the rules nor by passing "freak" legislation can the situation be improved.

The members of the committee, however, maintained their mental equilibrium, indulged in a tremendous amount of real work and finally formulated five propositions, which, after being amended and rephrased, were submitted with the idea that they would ultimately form the text of a uniform statute.

I.

"Any rule of evidence need not be enforced if the trial judge, on inquiry made of counsel or otherwise, finds that there is no bona fide dispute between the parties as to the existence or non-existence of the facts which the offered evidence tends to prove, even though such facts may be in issue under the pleadings. No error can be assigned or predicated upon the violation of any rule of evidence, either at law or in equity, when it appears from statements of counsel or from other evidence in the case or is shown in any other lawful way, that there is no bona fide dispute between the parties as

to the fact sought to be proved or disproved by the offered evidence, even though such fact may be in issue under the pleadings."

II.

"The trial judge may express to the jury, after the close of the evidence and arguments, his opinion as to the weight and credibility of the evidence or any part thereof."

III.

"No person shall be disqualified as a witness in any action, suit or proceeding by reason of his interest in the event of the same as a party or otherwise.

"In actions, suits or proceedings by or against the representatives of deceased persons, including proceedings for the probate of wills, any statement of the deceased, whether oral or written, shall not be excluded as hearsay, provided that the trial judge shall find as a fact that the statement was made by decedent, and that it was made in good faith and on decedent's personal knowledge."

IV.

"A declaration, whether written or oral, of a deceased or insane person shall not be excluded from the evidence as hearsay, if the court finds that it was made and that it was made in good faitn before the commencement of the action and upon the personal knowledge of the declarant."

V.

"Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge shall find that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation and calling of every kind."

It should be noted that these propositions were not based on a prior argument or mere theoretical supposition. Several hundreds of lawyers were consulted and their observations, based on actual experience, were made the foundation stones of the committee's work; in other words, the committee made a sincere effort to ascertain just how the present rules work as a practical matter and just what changes the bar considered necessary and proper.

Rules of Evidence

(To apply only to matters actually in dispute.)

In both civil and criminal litigation, it is the custom of many so-called lawyers to object to anything and everything which they deem prejudicial to their case, or perhaps they may have in mind merely the idea of embarrassing or harassing their opponent. This is not only exasperating, but it is a time-killing device of the first magnitude, and has a great tendency to sidetrack the court or jury and, in fact, it is often done for the last mentioned purpose.

In every case it will be found that there is one main issue or at most two or three and, unless there is a serious dispute regarding a material matter, the court's valuable time should not be taken up with wranglings over moot questions of evidence.

A conscientious application of this one rule alone would do a world of good in relieving the present congestion of the courts and enabling them to administer practical and speedy justice.

Right of Trial Judge to Comment on Evidence

In regard to this rule, there is more ground for difference of opinion, depending to a large degree on the value attached to the present-day jury system.

This practice of commenting on the evidence has been followed in the Federal courts for years, although many of the judges have been exceedingly careful about the use or abuse of the privilege. The right must, indeed, be most carefully exercised, but, then, the entire administration of the law requires caution.

Any objection to this rule rests, of course, on the broad ground that in effect it destroys the efficacy of the time-honored jury system by substituting the opinion of one judge for that of twelve jurors; that the jurors will unquestionably reflect in their verdict the expressed opinions of the trial judge. Yet the other extreme should be considered. Without this rule, the judge must sit, helpless and powerless, although

to his legally trained mind, it is quite apparent that the jury are obtaining a totally erroneous idea of the weight and persuasive effect of certain evidence. The procedure in the Federal trial courts does not, it is thought, indicate any serious deprivation of constitutional rights and there is no reason why one practice should exist in a Federal court, and a contrary practice be followed in a State court.

The committee sent out questionnaires on this important subject to more than 2,300 lawyers. Of those having experience in courts when judicial comment is permitted, 54 per cent believed this comment materially assisted the jury in reaching a conclusion, about 10 per cent were doubtful and 30 per cent returned a negative answer. Again 50 per cent thought this practice reduced the number of new trials and 75 per cent believed that judicial comment brought quicker verdicts and reduced the number of disagreements. Others thought the rule would result in closer attention of the trial judge.

Should such a rule be generally adopted by the State courts, it is clear that any comment by the judge relating to the weight and credibility of the evidence should not be made until after the close of the evidence and argument, and this is exactly what the committee advises. In other words, the jurors should be allowed to formulate their own opinions during the course of the trial.

Coming, as it does, from this committee as a result of more than five years of consideration, this proposed rule is at least worthy of serious consideration. Whether we are quite ready for it now is another question, about which opinions are bound to differ. The jury system itself is, however, the subject of serious criticism at the present time, and in the course of two generations of lawyers it is quite possible that some changes will develop or perhaps that the jury system itself in its present form may pass into oblivion.

Admission of Declarations of Decedents and of Interested Survivors

The existing rule, sometimes spoken of as the "dead man's act," excluding testimony of the claimant in an action on a claim or demand against an estate, is, as the committee explains, "merely a remnant of the common law disqualification of all interested witnesses," and, in accordance with the general abolition of these disqualifications, should be done away with. While it is true that great caution should be exercised in considering the declarations of an interested survivor, since the decedent is not there to refute his statements, nevertheless, this is more a matter of credibility of witnesses than of admissibility of evidence. The rule, as it stands today, may even prevent legitimate inquiry. The committee finally reached the conclusion that the rule was based on superficial reasoning, that from a practical standpoint it was unnecessary, and that, if the inquiry is relevant, the evidence should be admitted, regardless of the fact that it comes from the mouth of an interested survivor.

Declarations of Decedents and Insane Persons

Application of the hearsay rule is here involved and the uniform statute suggested by the committee merely provides that such a declaration shall not be excluded as hearsay, if found to have been made in good faith before commencement of the action, and upon the declarant's personal knowledge.

The committee recognizes the present tendency toward liberality in the admission of evidence and also calls attention to the fact that in the State of Massachusetts such a law now exists (Gen. Laws, Ch. 233, sec. 65.). This statute has been in existence for the past twenty-five years, and a questionnaire addressed to many lawyers practicing in that State brought the very general response that the law was satisfactory, that it was not conducive to perjury, but was an aid to the establishment of the truth.

Memorandum, Books and Records

This suggested rule of evidence merely makes a discretionary matter out of something which is at present more or less arbitrary. If, in the opinion of the trial judge, the inquiry after truth will be aided, the book or document is to be admitted in evidence, for matters relating to its form, surrounding circumstances and personal knowledge of the maker do not affect admissibility, but merely credibility. There can be nothing particularly obnoxious in such a rule and, in fact, many courts have already tacitly followed such a procedure.

In the opinion of the writer, all of these propositions are not only logically and legally sound, but all are conservative and practical enough to be generally adopted. They are, as can readily be seen, formulated on the basic theory that it should be the

(Continued on Page 23)

Assembly Constitutional Amendment Number 27—Water Rights

SPECIAL REPORT MADE TO THE COMMITTEE ON CONSTITUTIONAL AMENDMENTS

By S. B. ROBINSON *of the Committee*

(Filed December 6, 1927)

Pursuant to an assignment made to me by Mr. Richard C. Goodspeed, chairman of the Committee on Constitutional Amendments, I beg to submit the following report on Assembly Constitutional Amendment No. 27, relating to the use of waters.

The amendment is to be found in Statutes, 1927, page 2373, and proposes to add to Article XIV of the Constitution a new section to be numbered 3 and to read as follows:

"Sec. 3. It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; *provided, however,* that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

It is, of course, a matter of common knowledge that the proposing of this amendment sprang out of the decision of the Supreme Court of this State, rendered on December 24, 1926, in the case of Herminghaus v. Southern California Edison Company (73 C.D. 1, 252 Pac. 607), and that it was the result of a widespread feeling that, no matter how sound the decision of the Supreme Court in that case might be, the general welfare of the State would be subserved by limiting the rights of riparian owners to such use of the waters of streams as not only may be reasonable as against other riparian owners on the same stream, as now, but also may be reasonable as against present or future appropriators of the waters of such streams.

Before the arguments for and against the proposed amendment can be intelligently discussed it is necessary to have a clear conception of the fact that in the Western States, where waters are used more extensively than elsewhere for irrigation, and therefore the law of waters is of paramount importance, there are two distinct and divergent doctrines or theories as to the foundation and source of water rights. These have been designated by Wiel in his notable work on Water Rights in the Western States as the "California and Historical Doctrine" and the "Colorado Doctrine," which he refers to as being based respectively on the "Historical Method" and "Logical Method" of legal investigation. The expressions, "Riparian Theory" and "Appropriation Theory," are sometimes used, although they tend toward confusion, for the reason that rights by appropriation may exist even in those States which are committed to the "Riparian Theory." It might not be inappropriate to refer to the two theories in terms which have lately

been prominent in newspapers and magazines, and call them the "Fundamentalist Theory" and "Modernist Theory."

The distinction between the two theories is stated and commented on by Wiel as follows:

"The Western States are divided into two classes, one basing its theories on the proprietorship of the United States in the public domain, deraigning the right of the appropriator as a grant from the United States, confining appropriation to waters upon public lands, and recognizing the common law of riparian rights for waters flowing over lands that have become private before a diversion; the other deriving the rights of the appropriator from the State, and recognizing no law of waters but that of prior appropriation. The former, the California and historical doctrine, is in force in California, Kansas, Montana, Nebraska (partially), North Dakota, Oklahoma (possibly), Oregon (partially), South Dakota, Texas (partially), and Washington. The latter, the Colorado doctrine, is in force in Alaska, Arizona, Colorado, Idaho, Nebraska (partially), Nevada, New Mexico, Oregon (partially), Texas (partially), Utah, and Wyoming.

"The doctrine of the latter States is that the question is one of local law, becoming such by a construction of the Federal statutes which departs from the history of those statutes, but is otherwise possible; or becoming a matter of local law as inhering in State sovereignty regardless of Federal statutes, a position which the courts, following the California doctrine, have attacked as open to constitutional objections, but which (without considering the objections) finds favor in the most recent decisions of the Supreme Court of the United States and is found in some recent expressions of the California court itself. The recent decisions of the Supreme Court of the United States, the great value of property in the arid States relying upon the Colorado doctrine, and the State administrative systems which have become established, leave no doubt that the system has come to stay, so far as it concerns rights between private persons, in any State that

has to-day adopted it; but a certain qualified reservation of Federal proprietary rights, so far at least as is necessary to the beneficial uses of government property, and for Indian reservations, is still steadily asserted in the United States Supreme Court's decisions, and the recent discussion of the policy of conservation has revived the assertion of Federal proprietary right.

"It is hazardous to express an opinion where the authorities are in such conflict. Three things, however, the writer ventures to say with some confidence:

"One is that Lux v. Haggin could not have been decided other than it was, without a breach of continuity in the California law. The California doctrine was contained in the principles laid down long before, by Judge Field in Moore v. Smaw and Boggs v. Merced, that the public lands with all accustomed incidents belong to the United States; that the freedom of the public domain is a matter resting with Congress, and is for the public domain alone; that the rights of private land, once the land passes out of the public domain, are the same and as secure in California as in any other State of the Union. To Judge Field more than any one else is this attitude of the California law due.

"The second is that which of the two theories one shall regard as the correct formula is a matter of the difference between the "historical" and the "logical" methods of legal investigation. The California law is a consistent evolution from the political conditions before the Civil War, when the Federal title was the starting point, and the citizen but a trespasser upon that title; and from that beginning it makes a continuous history. The Colorado law, on the other hand, not bound by such a history to a past generation, holds the law open to logical deduction anew from general rules, and does not find a Federal title or riparian rights in such rules if the State law to-day denies them. So the difference lies between which road one travels in his investigation; the "historical method" will bring him to the Federal title and common-law riparian rights; the "logical method" will leave him instead where both are a matter of local law for each State to declare for itself. It is the latter method which the Supreme Court of the United States to-day applies, and against it the historical method can only say that it has departed from historical precedent.

"The third is that the Western law of waters is in a state of evolution in which legal formulas, whichever of the two one may adopt as theoretically the right one, are not of greatest importance; for the law will eventually work itself out according to the attitude of the people, whatever way that may finally become settled hereafter. While we have endeavored to treat the matter purely as a legal one, yet in reality it is, and always has been, largely shaped by political forces, accommodating itself much to the thought of the times." (Wiel on Water Rights in the Western States, Vol. 1, p. 225, Sec. 186, Third Edition. (1911).)

It may be well to enlarge somewhat on the statement of the theories contained in the foregoing quotation, briefly in the case of the Colorado doctrine, and much more in detail in the case of the California and historical doctrine.

As to the Colorado doctrine, it is sufficient for the purposes of this report to say that it rests on the theory that when the States which have adopted that theory were admitted to the Union they were supreme sovereign powers with the right to determine absolutely all questions of property rights, and that they elected to consider the waters of flowing streams as being public property so that private rights therein could be created in whatever manner the laws might determine. Pursuant to this theory, the laws of those States adhering strictly thereto ignore all riparian rights which existed at common law and recognize only the right of the appropriator.

It is of great importance to note that under this theory the appropriator derives his right from the consent of the State, given in its sovereign and governmental capacity, and expressed in its laws, that by appropriation he may acquire a right to something which theretofore had not been reduced to ownership, but was public. This theory is somewhat analogous to the theory that by capturing wild animals which, in a state of nature, belong to no one, a person may acquire the ownership of them, or by

confining air (as, for instance, in a compressed air tank or reservoir) one may acquire the ownership of it so long as it remains confined.

It is sufficient for the purposes of this report to consider the California and historical theory only with reference to the State of California and, for brevity, it will hereinafter be spoken of as the "California Doctrine" or "California Theory." The fundamental distinction between the California theory and the Colorado theory is that the California theory recognizes that riparian rights attached to all streams within the State at the time of the admission of the State to the Union, and that the Federal government as the proprietor of the public lands had the same riparian rights as any private proprietor—in other words, that the right to the use of the waters was a vested property right existing at the time of the admission of the State, extending to and affecting all streams. The California theory, therefore, recognizes that all rights to the use of waters in the State of California spring from and are a part of that property right, once and for all vested on the admission of the State.

The foundation for this doctrine is the fact that the first Legislature of California, convened before the formal admission of the State into the Union, adopted on April 13, 1850, an act entitled "An Act Adopting the Common Law," by which it was declared that

> "The Common Law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of the State of California, shall be the rule of decision in all the courts of this State." (Stats. 1850, p. 219.)

In the oft quoted case of Lux v. Haggin, 69 Cal. 255, the Supreme Court held that by virtue of the last quoted enactment the English law of riparian rights was adopted by the State of California, and that the owners of lands along streams, including the United States with respect to public lands, had the status and rights of riparian owners as recognized by the common law, thus establishing the riparian theory as the basic principle upon which our law of water rights rests.

Elaborate consideration of the nature of the English law of riparian rights would unduly extend this report. Suffice it to say that although the common law recognized no ownership in the corpus of the water until actually taken from the stream and reduced to possession, it nevertheless recognized that the right to reduce the water to possession rested exclusively with the riparian proprietors, that that right could be exercised only for uses to be made on the riparian lands, and that the right was not only property, but was even more than an appurtenance to the riparian land, being in fact part and parcel of it.

It is important to realize that it is literally true that the riparian rights recognized by the common law of England are the foundation for all water rights in the State of California, including rights by appropriation, and that, therefore, there is a fundamental distinction between rights by appropriation in California and rights by appropriation in States adhering to the Colorado Doctrine.

The statement that rights by appropriation in California have their foundation in the law of riparian rights may be believed by some to be a startling and unsound statement. There seems to be a very widespread belief, or supposition, that rights by appropriation are not only different from riparian rights, but that they are foreign and antagonistic thereto,—in short, that we have two distinct, unrelated and almost inconsistent kinds of water rights; viz., the riparian right, springing from, or more accurately, being an integral part of, the ownership of lands bordering the streams, and a right by appropriation of the kind recognized under the Colorado theory, something in the nature of an unrelated and foreign grant from, or privilege accorded by, the State in its sovereign capacity.

Careful consideration of the origin of rights by appropriation in the State of California will show clearly that the right by appropriation is not foreign or hostile to the riparian right, but springs out of, and in a sense is part of, the riparian right, and has its origin in grant from the riparian proprietors.

In order to demonstrate the soundness of this proposition, it is necessary to review briefly the history of the State.

It will be remembered that the territory now embraced within the State of California was formerly a part of the Republic of Mexico and became territory of the

United States, but not a State, by virtue of the treaty of Guadalupe Hidalgo entered into in 1848, and that California was admitted to the Union as a State on September 9, 1850.

Upon the cession of the territory by Mexico to the United States, the United States became the proprietor of all lands within the territory now embraced in the State of California which had not theretofore passed into private ownership, and from that time until the creation of the State and its admission to the Union had the full, sovereign or governmental control of the territory and over the public lands therein, in addition to being the proprietor of such lands.

Upon the admission of California to the Union, the governmental control of the United States over such lands and water rights ceased (excepting in so far as pertained to the very limited powers exercised by the Federal government within the several States), but its rights as the proprietor of lands remained unaffected.

Prior to the admission of California as a State the gold rush occurred and the hordes of people thronged the central portion of the State, intent on wresting a fortune from the ground.

These miners seized not only the ground containing the gold, but water for their mining operations, watering their stock, and domestic use, and somewhat later, farmers came and seized water for irrigation purposes, to supply the needs of the increasing population.

However commendable their exploitation and development of the public domain may have been, and however willing the country at large may have been that these resources should be exploited and developed, the legal status of the settlers was that of trespassers, and this trespass occurred for the most part on the proprietory lands of the Federal government, although history seems to indicate that to a considerable extent previously existing private titles were ignored and eventually lost sight of.

These pioneers, however, although technically trespassers, were not at heart lawless, and almost immediately possessory rights in mining claims and in waters came to be recognized. However lacking in legal title any of the settlers may have been, they respected priorities of possession as between themselves, and as few, if any, had legal title, the courts perforce had to adjudicate controversies on the basis of priorities of possession.

It was not long, however, before it was realized that a state of affairs in which hardly anyone had legal title to what he possessed, was extremely unsatisfactory, but vast interests had come into the possession of the miners, and equity loudly called for the conversion of the bona fide possession of these trespassers into a legal title. Consequently, in 1866 Congress passed an Act (14 U.S. Stat. at L. 251) recognizing and legalizing these possessory rights.

Section 1 of the Act provided that

> "The mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be *free and open* to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States."

By Section 9 of the same Act, later embodied in Section 2339 of the Revised Statutes, it was provided that

> "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage, shall be liable to the party injured for such injury or damage."

By Section 17 of the Act of July 9, 1870 (16 U.S. Stat. at L. 218), later incorporated in Section 2340 of the Revised Statutes, it was provided that

> "All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as

may have been acquired under or recognized by the preceding section."

It will be noted that by these provisions Congress in effect declared the public lands and waters of the United States to be subject to appropriation. It is probably helpful in considering the origin of rights by appropriation in California to emphasize mentally the fact that mining locations and water appropriations, considered as legal rights, as distinguished from earlier acts of trespass, sprang from the same statute, and are alike based on the consent of the government that its property may be taken into private ownership in a certain manner. Everyone recognizes that in making a mining location on public lands he is availing himself of the offer of the privilege to do so made by the United States, and acquires his title from the Federal government as the proprietor of the lands, but unfortunately it is not equally well recognized that the making of an appropriation of waters in California is likewise the acceptance of an offer made by the Federal government with respect to Federal lands alone, of the right to acquire a portion of the government's interest as a riparian proprietor in the streams flowing through its lands. It is true that the method of making appropriation is prescribed by the statute law of the State, but that does not change the fact that the right to make the appropriation springs from the Federal government in its capacity as a riparian proprietor, except in the comparatively rare cases of appropriation on lands owned by the State of California in its proprietary capacity.

The reason for the method of appropriation being embodied in the State statutes is found in the fact that the method had sprung up as a custom among the miners and was recognized by the California courts in adjudicating their possessory rights, and that Congress in recognizing the location of mineral lands and the appropriation of waters evidently deemed it expedient to let these customs prevail by expressly recognizing that the local customs and laws should control such method.

The Supreme Court of the State has consistently recognized the riparian right as the foundation of all water rights in California, and the fact that the right of appropriation springs from the consent or grant of the Federal government and not from the State except as to waters on the State's proprietary lands.

Lux v. Haggin was, of course, the leading case, but the decision covers two hundred pages of the reports and adequate quotation is therefore impossible.

A much briefer discussion of the matters here under consideration is to be found in the decision in the case of Palmer v. Railroad Commission, 167 Cal. 163. In this case the Supreme Court said:

"The theory that the water of a nonnavigable stream in this State is in some sense 'public water' has been advanced before. It has been claimed that a diversion of water under the provisions of the Civil Code (secs. 1410 to 1422) constitutes a grant of the water by the State to the appropriator. The idea may have arisen from the statement sometimes made in the decisions that the riparian owner has no right in the corpus of the water (Eddy v. Simpson, 3 Cal. 252) and that running water cannot be made the subject of private ownership, that the right to use the water of a stream 'carries no specific property in the water itself.' (Kidd v. Laird, 15 Cal. 197). This is far from saying that the property in the water is vested in the public, either for general use, or as property of the State. The doctrine that it is public water, or that it belongs to the State because it is not capable of private ownership, has no support in the statutes of the State or in any decision of this court. * * * * * * * Such right to the water of ruuning streams as there is under the law is vested entirely in the several riparian owners along its course. It is subject to the common use of all riparian owners, but neither has a specific property in any part of the water while it remains running in the stream. The United States, with respect to the lands which it owns in this State, is a riparian proprietor as to the streams running through such lands. It is only by virtue of that fact that it has any right or power of disposition over the waters thereof. And its right and power in that respect is no greater and no less than that of any other riparian proprietor. By the Act of July 26, 1866 (14 U.S. Stats. 251), the United States consented that private persons might acquire rights to water flowing in streams through its lands by taking possession thereof, that is, by diverting the same, in such manner as should

be provided by the laws of the particular State. Where such diversion had not been made, a grant of its lands by the United States to a private person without reservation, would carry with it the riparian rights pertaining to that land in streams flowing through it, in the same manner as in the case of a grant of land by a private owner. So. also, the State, with respect to the lands it owns, which are not devoted to a specific public use, is in the same category as any other landowner. It has riparian rights with respect to such land in the streams running over it, which its grant carries to the grantee. The provisions of the Civil Code above mentioned have the effect of a declaration by the State that any person who may divert water from a stream in pursuance of those provisions will thereby obtain a right in the stream paramount to the riparian rights which the State may have therein by virtue of the fact that the stream may run over lands then belonging to the State. To that extent it operates as a grant from the State, but this is only because the State had the riparian right, and not because the water was in any sense public water devoted to public use.

* * * * *

"The proposition that the waters of a non-navigable stream are in their nature private property and not property primarily devoted to public use is not only established by authority; it is demonstrable from well-established principles of the law of real property. * * * * Hence, the right to the water of flowing streams in this State, prior to any sale or disposition of lands by the State or by the United States, was vested in the State or in the United States, not in their respective governmental capacities as sovereign and for the common use of the people, but as riparian owners in their respective capacities as landed proprietors. These rights were and still are strictly proprietary and in their nature private. When land was disposed of by either, the riparian water right pertaining thereto passed to the purchaser as a part of that realty. It necessarily remained a private right, since the sale did not have the effect of dedicating it to public use. All these rights belong primarily to the riparian owners, consisting of the United States, the State, and purchasers from one or the other of them. They cannot be divested from these riparian owners, and have not been divested from them, except by their consent, expressed, as by statute or by actual grant or contract, or implied, as by prescription; or by enforced taking for public use, as by condemnation. It follows that they remain private property when they pass to purchasers, and that when they pass from the riparian owner to others by prescription, grant, or consent, they do not by that transfer become impressed with any public use and it still remains true that there must be a dedication to public use to divest the private right. They are no more public than is the land to which they belonged and of which they formed a part."

The decision in the Herminghaus case, although not so long as that in Lux v. Haggin, is of such length as to preclude adequate summarization in this report. It seems enough to say that the court, after full consideration of voluminous and exhaustive briefs presented by a great array of eminent attorneys appearing not only in behalf of the parties but as amici curiae, carefully reviewed its earlier decisions and again held in unmistakable terms that the riparian right was a vested property right, and part and parcel of the land itself, and could not be divested against the will of the owner otherwise than by the power of eminent domain, notwithstanding the attempts of the Legislature, hereinafter more fully discussed, to limit riparian rights to reasonable use, and to make the surplus subject to appropriation. Its holdings on this subject have been even more recently reiterated in the case of Fall River Valley Irr. Dist. v. Mt. Shasta Power Corporation (74 C.D. 275, 259 Pac. 444), in which the Supreme Court discussed the Herminghaus decision, and in effect replied to the public criticism of that decision.

The essence of these and other decisions may be boiled down to a simple statement that at the time of the admission of California to the Union riparian rights were vested property rights and extended to all streams regardless of whether the lands through which they flowed were private or were the property of the Federal government or the property of the State of California, and that such rights cannot be divested by any law, or even by the State

Constitution itself, and that rights by appropriation in this State spring from the consent of the Federal government and the State government, given in a proprietary capacity, that such appropriations may be made upon such Federal or State lands respectively.

To this should be added the statement that while the right of an appropriator is limited to and measured by his reasonable and beneficial use, and the right of the riparian proprietor is limited to such use as may be reasonable, having regard to the reasonable needs of other riparian proprietors on the same stream, there is no limitation whatever to reasonable use by the riparian proprietor as against an appropriator. The riparian proprietor can object to any diversion made above him by anyone other than a riparian proprietor, or even by a riparian proprietor for a non-riparian use, other than or in excess of such right of appropriation as became vested before the lower riparian lands passed from the ownership of the Federal government or the State of California.

This statement intentionally ignores, as unnecessary to be considered here, certain very minor exceptions relating to such matters as "vagrant," "enemy" and "extraordinary flood" waters.

Anyone interested in this subject should at least read the address on *The Development of the Law of Waters in the West*, delivered by Hon. Lucien Shaw, while Chief Justice of the Supreme Court, before the joint session of the American Bar Association and the California Bar Association at San Francisco on October 9, 1922, which appears in full as an appendix to Volume 189 of the California reports at page 779, and also the decisions of the Supreme Court in Lux v. Haggin, Palmer v. Railroad Commission, Herminghaus v. Southern California Edison Co., and Fall River etc. Dist. v. Mt. Shasta Power Corporation, cited above.

Having thus at some length, although, in view of the importance and complexity of the subject, briefly and inadequately, traced the history and considered the foundations of our California law of water rights, the writer deems it proper likewise to trace the history of the movement which finds its latest expression in the proposed Constitutional Amendment under consideration in this report.

In order to understand the attitude of Californians toward riparian rights, it is necessary again to consider the conditions under which the early settlers lived. As noted above, the vast developments following the discovery of gold were made almost entirely on lands of the United States, and by mere trespassers. The Federal government was passive and acquiescent. Actual property rights, so far as land and water were concerned, were almost unknown. Possession was the measure of right, and possession, so far as flowing water was concerned, meant use. As between two trespassers claiming the same water, he who first put it to a beneficial use naturally was regarded as having the better right, and it was also natural to regard that right as continuing only so long as such beneficial use was continued.

This rule of beneficial use, at first a mere recognition of natural justice, soon became a custom, and was recognized by the courts. The law of riparian rights was part of the law of the land by virtue of the adoption of the common law, but with practically no actual owners of lands present to assert claims, the very existence of such rights was naturally lost sight of.

Even the lawyers, who from their study knew in the abstract of such rights, had nothing to do with them in their everyday practice. All they were actively concerned with as to flowing waters was the possessory right of the user, and it was natural that they, and even more so, the miners, farmers and others interested in the use of the apparently ownerless waters, should grow to think of beneficial use as being the full measure of the right to flowing waters. They dwelt in and devoted all their thoughts and labor to the development of a country where the lands and the waters were free to all to take, possess and use, subject only to due respect for the prior occupancy and use of other mere possessors. They were builders of an empire from a wilderness. Honest, strong, self-reliant men, from stern necessity trained and ready to defend their hard earned homes and possessions from aggressions.

Time rolled on. More settlers came and many turned to agriculture. Vast holdings of lands passed into private ownership—arid lands which under irrigation would yield great harvests. The San Joaquin Valley lands were dry, but through them flowed streams of water fed by the melting

snows of the Sierra Nevada. With the growing importance of these privately owned lands came the assertion of riparian rights in the streams which flowed through them, and conflicting claims of rights by appropriation in the same streams for the irrigation of non-riparian lands. Litigation arose involving some of the largest interests in the State, including the case of Lux v. Haggin, with the litigation came public discussion and political agitation.

This was entirely natural. Thirty years had passed since the discovery of gold. The doctrine of beneficial use was rooted deep in the public mind. It was utterly impossible that the great majority of Californians of that time should do other than regard the doctirne of riparian rights—to most of them a "new-fangled" idea—as an unjust, unreasonable and harsh thing, fraught with danger to the interests of the State.

It was as repugnant to the sense of right and justice of these people as it was harmonious with the sense of right and justice of the people of England where it was evolved as part of the common law as naturally and inevitably as was the rule of reasonable use under the radically different conditions of the early days of California. In England all the land, with minor exceptions, insufficient to affect the public consciousness, was, and for centuries had been, private, and owned largely by the privileged and titled class. There were no vast areas of land free and open to whoever might choose to go upon them. Private estates were zealously guarded from the intrusion of others. For the most part, even the privilege of taking game was rigidly limited to the owners of estates and their invited guests. Trespassers and poachers were, both in the eyes of the law and in the minds of the people, criminals and offenders against natural justice and rights, hardly less contemptible than the burglar, who not only violated the sacred right of exclusive enjoyment of the landed estate, but carried his wrongful incursion one step further into the home or castle upon that estate. Under such conditions the rule of riparian rights was inevitable. Those whose estates contained the flowing streams had the sole right of access thereto and while the Englishman's sense of natural justice readily evolved and incorporated in the common law the rule of correlative rights and reasonable use as between different riparian proprietors on the same stream, it could no more conceive or grasp the idea of a right to water springing from an unauthorized entry on his estate than he could recognize any right of property in the burglar who entered his home and seized his silver. Neither could his sense of justice tolerate the use of any part of the water on non-riparian lands by other riparian proprietors on the same stream, or by others under their license or grant. The right to use the water at all sprang from the ownership of riparian lands and it was wholly logical to limit its use to those lands.

But these concepts were repugnant to the Californians of the late seventies and the eighties. The riparian right litigation engendered controversies and hatreds, and molded the issues in the general election of 1884. Great pressure was brought to bear ti induce the Legislature to repeal section 1422 of the Civil Code, the final section of the title which prescribed the method for the appropriation of water, and which provided that:

> "The rights of riparian proprietors are not affected by the provisions of this title."

Many believed that the repeal of this section would eliminate the rule of riparian rights from the law of California, leaving the law of appropriation to stand alone, but the Legislature refused to repeal the section.

On April 26, 1886, came the decision of the Supreme Court in Lux v. Haggin, holding that by virtue of the adoption of the common law and from the time of the creation of the State, riparian rights attached to all flowing streams and with respect to all lands thereon, whether owned by private individuals or the Federal government, subject of course to such rights by appropriation as had vested under the consent of the government.

In 1887 the Legislature repealed section 1422 of the Civil Code, but the repealing act had a clause reading:

> "provided that the repeal of this section shall not in any way interfere with any rights already vested."

Of course, even without the proviso, vested rights would have remained unaffected, by virtue of the guarantees of both the Federal and State Constitutions. The conclusion is unescapable that the repeal was utterly ineffective, for all vested rights were saved, and, as held in Lux v. Haggin, all riparian rights were vested.

(To be Concluded)

Proposed Official

BAR ASSOCIATION BUILDING

On Flower Street (between Sixth and Seventh Streets)

For Information

PHONE MR. J. L. ELKINS

TUcker 1384

The President's Page

Fellow Members,

Los Angeles Bar Association:

COMMITTEES

Most of the committees have been appointed, and many of them have already organized and have formulated their plans. I note on the part of the membership a fine spirit of co-operation and desire to aid in the work of our Association. We shall find a way to make effective through the State Bar the constructive endeavors of our committees. Naturally a good portion of committee work is routine and related solely to the functioning of the organization. I had hoped that the members of the State Bar Sections from our Association would be appointed by us, as it had been my intention to appoint to the appropriate section some of the members of each similar committee, thus taking our committee efforts directly into the State Bar Section work. However, the State Bar has seen fit to adopt a different system, whereby their sections will be composed of volunteers, and coordination of the work of the sections and our committees will not be so easily accomplished as it might have been.

NEXT ASSOCIATION MEETING APRIL 19

Your attention is directed to the next general meeting. I think you will enjoy the program, notice of which you already have. It is not only well balanced as to the time and character of the addresses, but an interesting discussion may be had from the floor concerning suggested changes in our form of plebiscite.

Some members have criticized our meetings because insufficient opportunity is provided for free discussion. Mr. Variel, your secretary, has suggested that we take a few minutes at each meeting for suggestions and discussions from the floor. I think that is an excellent idea, and shall follow it except when our programs are too long.

REFORMS IN PROCEDURE

The air is charged with "reform," and the cry of the public seems to have taken hold of the bar, with prospects of radical changes in civil and criminal procedure. So many members have asked me for an expression of my views that I shall use this space to state them. It is my personal belief that there is not a great deal wrong with our procedure. In criminal matters I do not feel qualified to speak on the technical aspects, but from my own observation I am convinced that the great trouble there lies neither with the procedure nor with the courts. Statistics in regard to criminal cases show that, in such as do not fall by the wayside, conviction is had in a large and satisfactory percentage of them, notwithstanding that in some instances inexperienced and unprepared deputies prosecute them.

In civil procedure there can be accomplished some improvement, but I doubt the necessity of any wide departure from our present system. There is a movement on foot to abolish the demurrer, on which question there is considerable diversity of opinion.

Clever lawyers demur as little as possible. Their reasons are several. The first is (and perhaps it does not reflect the finest ideal) that a lawyer does not care to educate his opponent. Another is that he has no desire to put himself or the other side to unnecessary trouble. The reason which should move us all would come from a sense of duty. If the pleading reasonably informs a lawyer of the gist of the contention, he should be satisfied. Lawyers get into bad habits with the use of demurrers, filing them to gain time, again because they think it smart to be contentious over trivial technicalities, and sometimes just to aggravate the other fellow. A demurrer filed when the pleader conscientiously feels that he has an important point is useful and proper. We must not overlook the fact that many cases, which would consume days of trial, only to be thrown out of court at the conclusion of the hearing, may be under our system entirely disposed of on demurrer in an hour or so of hearing.

Our Superior Court has recently tightened up on demurrers, and if the court has not already in fact such right, power should be given the court to assess costs for frivolous demurrers. We had some such rule years ago, but the courts did not enforce it with sufficient strictness. Such a rule would cut off from filing more than half of the demurrers. In any event, the filing of an answer after demurrer overruled may

be allowed only upon such terms as may be just, and therein lines the control by the court of the whole demurrer situation. The bar committee in its meeting with the committee of the bench over two years ago advocated plans to cut down useless demurrers, and the subject is an old one.

Our code provisions call for a form of pleading as simple as could be suggested, viz., "a statement of the facts constituting the cause of action, *in ordinary and concise language.*" The trouble is that lawyers in many instances cannot or at least do not state matters in ordinary and concise language. The bar is at fault, not the system. Where there is one good pleader, I believe five of us are poor pleaders. We have all read pleadings having incomplete sentences, full of innuendoes, and three times as long as required, and often the pleader can state no cause of action at all. We suffer from the unprepared attorney, and of course the fact that men constantly coming here from other jurisdictions are unacquainted with our system makes efficient procedure difficult of attainment.

Great improvement was made by the last Legislature in the requirements as to answers, and this was due to the efforts of the bar.

If the members of the bar do not wake up and administer our system with more thought, we shall soon find the right of demurrer taken away and we shall probably have finally to accept the English system. I do not think it would be a tragedy at that. As to form of pleadings it amounts largely to giving the lawyer simplified form.

The procedure of Trinidad and Tobago, adopted over ten years ago, indicates what has been done in another jurisdiction, and provides amongst other things with regard to forms of pleadings:

> "Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defense, as the case may be, but not the evidence by which they are to be approved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums, and numbers shall be expressed in figures and not in words. Signature of counsel shall not be necessary; but where pleadings have been settled by counsel they shall be signed by him; and if not so settled they shall be signed by the solicitor, or by the party if he sues or defends in person.

"The forms in Appendices C, D and E, when applicable, and where they are not applicable, forms of the like character as near as may be, shall be used for all pleadings and where such forms are applicable and sufficient any longer forms shall be deemed prolix, and the costs occasioned by such prolixitv shall be disallowed to or borne by the party so using the same, as the case may be."

In the orders and rules of the Supreme Court of Trinidad and Tobago many concise forms of pleadings are set forth and must be followed where applicable. Concise prescribed forms would not fit all cases but would cut demurrers tremendously and would simplify many pleadings and make the practice of law easier. In fact, we might then do away with the demurrer entirely. I have enjoyed studying the *General Practice and Procedure of Trinidad and Tobago,* and am indebted to Mr. Jos. Bernstein of our bar for the opportunity of perusing the volume.

Rules of court, in my opinion, should govern our procedure. The bench and bar know how to make the necessary improvements and would do so immediately upon the power being given the courts. The Legislature has shown that it is incapable of disposing of such matters to the satisfaction of the public, the courts or the lawyers.

There is another improvement in our laws I should like to suggest, i. e., a change in our rule of contributory negligence. Our present law in that regard is archaic and we should, I believe, adopt the comparative negligence rule. For instance, to compel a pedestrian who suffers a severe injury, to bear the entire loss, and wholly to excuse the negligent driver of a vehicle who has suffered no injury, when each has proximately contributed to the injury, is wrong.

The jury in civil actions is one of the greatest incumbrances we have. Under fairly ideal conditions the jury will come to a fair determination of a cause, perhaps no better and no worse than the average judge; but in its year to year operation the jury system is unsatisfactory. Prejudice and passion often control verdicts, many of the jurors can not comprehend the instructions, and often they are unable properly to weigh and judge the facts. Any one who has engaged in jury trials and has had the opportunity of hearing the "post mortem" statements of the jurors knows this to be true. We have all heard our clients who have sat on juries themselves say that they never would want a jury to pass on *their* case if they ever had one. Our trial work would proceed with comparative ease and dispatch if we did away with juries in civil cases. As it is, the lawyer for the plaintiff picks jurors who look ignorant and weak, and the defense seeks intelligent, firm looking jurors. Often there is little choice. After voluminous instructions have been read to the jury, which is presumed to understand them, we appeal the case and then the higher court and the lawyers try to determine just what the instructions did mean.

I have written this not to try to impress my views upon the membership, but to provoke thought and discussion. The bar must not be carried away by some members of the public who have no conception of the problems, nor by members of our own profession who may be over enthusiastic; on the other hand, we of the bar must be responsive to changing needs and situations, and with our fundamental knowledge and intimate experience, we must wisely and conservatively effect any needed changes in our adjective and substantive law.

Additional 1928 Committee Assignments

The following appointments have been made by President Hubert T. Morrow since the publication of the first committee assignments in the issue of April 5:

COMMITTEE ON CONSTITUTIONAL AMENDMENTS

Richard C. Goodspeed, *Chairman;* Joseph L. Lewinson, *Vice-Chairman;* D. A. Schweitzer, *Secretary;* Jefferson P. Chandler, Robert M. Clarke, W. H. Anderson, Theodore Martin, Howard Robertson, Paul E. Schwab.

COMMITTEE ON PUBLICITY

Marshall Stimson, *Chairman;* Harry W. Elliott, *Vice-Chairman;* Chas. B. Hazelhurst, *Secretary;* Isidore B. Dockweiler, Fred H. Taft, John B. Beman, Arthur M. Ellis, Richard J. O. Culver, Roland Rich Wooley.

COMMITTEE ON CORPORATIONS

Donald Barker, *Chairman;* Edwin A. Meserve, *Vice-Chairman;* Donald P. Goodwin, *Secretary;* Ben S. Hunter, Milton K. Young, J. M. Friedlander, Robert M. Fulton, Thos. Bayard Leddy, Joseph Smith.

COMMITTEE ON THE BULLETIN

Andrew J. Copp, *Chairman;* Lucius K. Chase, *Vice-Chairman;* Harry G. Balter, *Secretary;* Henry G. Bodkin, Harold C. Morton, Franklin K. Lane, Jr., Henry I. Dockweiler, Maurice Saeta, Nathan Newby, Jr.

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912.

Of The Bar Association Bulletin published semi-monthly at Los Angeles, California, for April 1, 1928.

State of California, County of Los Angeles, ss.

Before me, a Notary Public in and for the State and county aforesaid, personally appeared R. H. Purdue, who, having been duly sworn according to law, deposes and says that he is the Editor of the Bar Association Bulletin and that the following is, to the best of his knowledge, and belief, a true statement of the ownership, management (and if a daily paper, the circulation), etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, embodied in section 411, Postal Laws and Regulations, printed on the reverse of this form, to wit:

1. That the names and addresses of the publisher, editor, managing editor, and business managers are: Publisher Los Angeles Bar Association, 687 I. W. Hellman Bldg., Los Angeles, California. Editor R. H. Purdue, 535 Title Insurance Bldg., Los Angeles, California. Advisory Editor Chas L. Nichols, 1408 Chapman Bldg., Los Angeles, California. Business Managers ———

2. That the owner is: (If owned by a corporation, its name and address must be stated and also immediately thereunder the names and addresses of stockholders owning or holding one per cent or more of total amount of stock. If not owned by a corporation, the names and addresses of the individual owners must be given. If owned by a firm, company, or other unincorporated concern, its name and address, as well as those of each individual member, must be given.) The Los Angeles Bar Association, an unincorporated association, composed of members of the Los Angeles City and County Bar. Address: 687 I. W. Hellman Bldg., Los Angeles, California.

3. That the known bondholders, mortgagees, and other security holders owning or holding 1 per cent or more of total amount of bonds, mortgages, or other securities are: (If there are none, so state.) None.

4. That the two paragraphs next above, giving the names of the owners, stockholders, and security holders, if any, contain not only the list of stockholders and security holders as they appear upon the books of the company but also, in cases where the stockholder or security holder appears upon the books of the company as trustee or in any other fiduciary relation, the name of the person or corporation for whom such trustee is acting, is given; also that said two paragraphs contain statements embracing affiant's full knowledge and belief as to the circumstances and conditions under which stockholders and security holders who do not appear upon the books of the company as trustees, hold stock and securities in a capacity other than that of a bona fide owner; and this affiant has no reason to believe that any other person, association, or corporation has any interest direct or indirect in the said stock, bonds, or other securities than as so stated by him.

5. That the average number of copies of each issue of this publication sold or distributed, through the mails or otherwise, to paid subscribers during the six months preceding the date shown above is ——— (This information is required from daily publications only.)

(Signed) R. H. PURDUE.

(Signature of editor, publisher, business manager, or owner.)

Sworn to and subscribed before me this 14th day of April, 1928. (Signed) ANNA BURZA.

(Notary Seal) (My commission expires March 18, 1930)

Form 3526.—Ed. 1924

LOS ANGELES BAR ASSOCIATION MONTHLY MEETING AND DINNER

BANQUET HALL

CHAMBER OF COMMERCE

1151 SOUTH BROADWAY

Thursday, April 19; 6.00 P. M.

Professor O. P. Cockerill, Dean of the University of North Dakota, will speak on the subject: "Equitable Conversion in California."

1. Statement of the doctrine; statutory limitations.
2. Equitable conversion by will. (a) California cases. (b) Conclusion.
3. Equitable conversion by contract. (a) General exposition from California cases showing adoption of the doctrine. (b) The right of creditors of vendor and vendee under contract of sale and purchase of land. (c) The risk of loss, showing the language of the decision is more opposed to the doctrine than the decisions.

Conclusion: The doctrine is fully recognized in California, but the minority rule as to risk of loss is adopted.

Judge Marshall McComb will give a ten-minute address on the Master Calendar.

Humorous stories will be heard from Will Anderson.

Proposed amendments to the By-Laws with reference to voting on candidates for judicial office will be taken up for consideration.

A ten-minute period will be devoted to suggestions for the general good of the Association.

Prompt reservations are requested.

Guests of members are welcome. Informal. Dinner, $1.50.

Come at six o'clock and meet our friends and associates before dinner.

Program Committee: Joe Crider, Jr., Chairman; John W. Hart, Vice-Chairman; Kimpton Ellis, Secretary; Kenyon F. Lee, Walter E. Burke.

R. H. F. Variel, Jr.,

VAndike 5701. *Secretary.*

INSURANCE AS RELATED TO DIVORCE PROCEEDINGS

A representative of an insurance company has written a letter advising the Los Angeles Bar Association of a matter that concerns the clients of many attorneys. The letter, in part, is as follows:

"In divorce proceedings, it seems usual for attorneys merely to mention all property and not, as a general rule, to designate life insurance policies by company and number. This practice works a great hardship on the insured who has taken a policy out prior to the amendment of the community property law in August, 1923, as after the divorce decree becomes final, the insured is not allowed to change the beneficiary under his policy without the wife's consent, which, we find, he is seldom able to obtain. If the attorneys would mention the policy by company and number in their settlement, it would be of assistance to the insured who may wish to nominate a new beneficiary or surrender his policy for its cash value."

CORPORATE SECURITIES ACT

The president of the State Bar has appointed a committee on the Corporate Securities Act of the following members:

Mr. James S. Bennett, chairman; Mr. H. L. Carnahan, Honorable Louis W. Myers, Honorable M. C. Sloss, Mr. Mark Slosson.

The Commissioner of Corporations has suggested to this committee the advisability of amending the Corporate Securities Act so as to authorize the Commissioner to initiate and direct criminal prosecutions for violation of the Act, and civil actions to enforce his orders by injunctive relief. The chairman writes that there seems to be some difference of opinion about equipping the office of the Commissioner with a staff of trial attorneys, in addition to lawyers qualified to act as counsel in corporate and financial matters. Hence the committee wishes to avail itself of the reasons for both views. Attorneys interested may address their communications to any member of the committee.

REFORMS IN LAW OF EVIDENCE

(Continued from Page 7)

function of the trial judge to determine, in the particular case, whether the offered evidence will illuminate the matter at issue. The search after truth is of paramount importance.

Special announcements by law firms of new locations and new associations are most effectively made to the profession through the pages of the BULLETIN. *In addition, such announcements serve as a manifestation of good-will toward and co-operation with the* BULLETIN *in its program of constructive endeavor for the welfare of the Bar Association.*

Post War Treaties of the United States

By REUEL L. OLSON *of the Los Angeles Bar.*

Speaking in St. Louis on November 10, 1927, at one of the sessions of the International Goodwill Congress, Professor Manley O. Hudson, of Harvard Law School, pointed out the present situation with respect to the small number of existing treaties of the United States as compared with those in effect before the World War. Two paragraphs of his address are as follows:

"In the nine years since 1918, we have made far less progress in international arbitration treaties than we made in the nine years preceding 1914. When the war began, twenty-two of the 1908 arbitration treaties were in force. Since the beginning of the War we have allowed eight of the 1908 treaties to expire by reason of the time limit set on their duration, and only nine of them have been renewed or extended. Our treaties with Austria and Hungary, China, Costa Rica, Denmark, Mexico, Paraguay, Salvador and Switzerland are no longer in force. The treaties with France, Great Britain, Italy, Japan, Netherlands, Norway, Portugal and Spain have been extended, but even the extended treaties with Italy and Spain have now expired. In the one case, with Sweden, the 1908 treaty was allowed to expire in 1918 and a new treaty on the same model was negotiated in 1924 to replace it. I have good reason to believe that the Swedish government desired to negotiate a more inclusive arbitration treaty with the United States in 1924, but that our government insisted on following the pre-war model. Since the war, also, as recently as February 10, 1926, we have negotiated one new arbitration treaty on the 1908 model with Liberia, and that is the only case in which we have made a new bipartite arbitration treaty in this period. In 1911, President Taft thought our 1908 treaties were inadequate, and new treaties of arbitration with France and Great Britain were signed, but never ratified. In fact it was a common opinion before the war that the 1908 formulae were not satisfactory; yet in 1927 we have not got beyond them. * * * *

"I have not attempted to state the reasons for this situation. I have attempted only to describe it, and I submit that on the facts Americans have little reason to be proud of our national contribution to the processes of peace since the war. Nor have we reason for much unction in our consideration of what other countries are doing. More than fifty other countries have agreed to go to the Council-table of the League of Nations before going to war. More than half as many other countries have bound themselves to go before the Permanent Court of International Justice in certain kinds of disputes. Many other countries have agreed to arbitrate all of their differences. But none of these policies is ours. We may be ever so confident that America will never offer menace to the world's peace. But can we blame other peoples if they fail to understand our failure to obligate ourselves to submit to the ordinary processes of peace? I am not sure that I understand the meaning of the oft-repeated assertion that America is the strongest country in the world, but if it has any meaning it would seem that we might feel ourselves as free as other peoples to rely on the peaceful ordering of our international relations."

In another address given at a dinner of the Massachusetts Branch of the League of Nations Non-Partisan Association, in Boston, October 28, 1927, Professor Hudson called attention to the every-day activities of the League of Nations. He pointed out in the following paragraphs that the work of the Assembly and Council does not constitute the only effective means of doing business, but that numerous conferences and meetings of different kinds are held at frequent intervals.

"Nor do the Assembly and Council constitute the whole League of Nations. Many other conferences must be held, if the needs of our international life are to be met. The Assembly and the Council adjourned in September, but let me mention to you a few of the things in the League's calendar of the current month, October, 1927. On October 1, a tenth session of the Advisory Committee on

Traffic in Opium and Other Dangerous Drugs was being held in Geneva, and a conference of Directors of Public Health was being held in Budapest. On October 10, a Committee of Experts met in Geneva to discuss the International Problems of the Counterfeiting of Currency, and on the following day a Committee on the Austrian Loan assembled in London and a Committe on the Unification of Tariff Nomenclature assembled in Geneva. On October 11, also, the Governing Body of the International Labor Office met in Berlin for its thirty-seventh session. On October 12, a Committee on Statistice in Inland Navigation met in Geneva. On October 17, a diplomatic Conference on Import and Export Prohibitions and Restrictions met in Geneva, and the Government of the United States was represented there by a strong delegation. In this very week, the Permanent Mandates Commission and the Malaria Commission are meeting in Geneva. Yesterday, a Committee of Experts on Maritime Tonnage assembled in London, and today the Health Committee is meeting in Geneva. Next month the meetings will be almost as numerous, and on December 5 the Council will meet for its forty-eighth session. Then if you will also keep in mind the several hundred people who are in Geneva the year around, as members of the Secretariat and the staff of the International Labor Office, you will have a picture of what is involved today in this new effort to organize the processes of peace.

"The League of Nations has had its most effective and useful and at the same time prosperous year in 1927. Fifty-six peoples are making progress with their effort to organize the world for peace. And their effort has now come to include the co-operation of other peoples who have not assumed formal membership. No country is wholly outside the League today, with the possible exception of Mexico. Soviet Russia, Turkey, Egypt, Afghanistan and the United States of America have some part, as certainly they have an interest. For not only does the League hold the field today as the only attempt at co-operative dealing with general world problems, but I think we may say that it is now so imbedded in the thoughts and the allegiance of so many men and women throughout the world that so far as we can see it has come into the world to stay. When the Boston *Transcript*, two days ago, rang editorially the 'death knell of the League of Nations,' it was dealing in hyperbolic fiction. If the progress we have achieved is not an adequate compensation for the sacrifices made by a generation which lived through the war, I submit that it is an adequate challenge to the intelligence and energy and enthusiasm of a generation which would seek to act so that its successors may not have to repeat that experience."

Book Reviews

By HARRY GRAHAM BALTER *of the Los Angeles Bar*

Lecturer in Law at the College of Law, Southwestern University

BALLENTINE ON CORPORATIONS; founded on Clark and Marshall; by Henry Winthrop Ballantine, Professor of Law, University of California; 1927; lxix, 927 p.; Callaghan & Co., Chicago.

This reviewer has had the good fortune of having once studied the law of corporations under Henry Winthrop Ballantine. It had always been this reviewer's hope that Professor Ballantine would some day put into book form some of the erudition and information which he has amassed in the field of corporation law.

Ballantine on Corporations purports to be based on Clark and Marshall. This acknowledgment shows, however, undue modesty on the part of Professor Ballantine. His book contains so much that is not found in the older work and so much that is not even in the best textbooks on corporation law that *Ballantine on Corporations* should really be considered as an original contribution of Ballantine himself.

This work is advertised as one intended especially for the law student. There is no doubt that as a student's book, Ballantine's is unexcelled. But the work deserves greater recognition. It is as fine a handbook on corporation law as any in the field. Although the style and manner of explanation of the work are, on the whole, simple enough for the student to understand, yet the underlying principles of corporate law are so clearly discussed, that the work is really invaluable for any practicing lawyer who desires to understand the problems and principles of corporation law.

Not alone are the elementary principles of corporation law familiar to every lawyer, thoroughly treated, but the more technical and less understood phases of corporation practice are analyzed in a delightfully fresh manner. For example, Ballantine's treatment of defective corporations, watered stock and no-par stock is really masterful. His is not a mere reiteration of the old principles generally relied upon, but Professor Ballantine has throughout made valuable contributions to the field. In his discussion of *ultra vires*, and especially of watered stock, Professor Ballantine has advanced some irrefutable theories that are genuinely original. It is no exaggeration to say that this book has set out more legal theory and has embodied more of the results of recent research than any other work on corporations. Especially helpful are the numerous citations to law review articles.

The book is of course a brief one, but it is surprisingly complete and thorough. Add to this the fact that the book is interestingly readable, and it will not be long before it is generally recognized that *Ballantine on Corporations* has no superior in the law of corporations.

COMMUNITY PROPERTY LAWS, IN CONTACT WITH FEDERAL ESTATE TAXATION; a monograph or brief, discussing the taxable status of the California widow's half of the community property; by Richard C. Burnett of the San Francisco

Bar, author of *Community Property Law According to Professor Juan Sala;* 1927; V, 134 p.; price $5.00; published by the author, San Francisco, California.

The main thesis of this brief—and that is all this monograph really is—is that the wife's title to her half of the community property should, on the husband's death, be based on a valuable and adequate consideration, one that is an "onerous" title, and should not be considered merely as a "gratuitous" title, which would be a recognition that the husband is really the owner of all of the community property during his lifetime. The natural result of such a thesis would of course be that the wife's interest would not be subject to the Federal estate tax.

Mr. Burnett is a student of our community property system, and this monograph is a serious attempt to persuade our courts to do what they have repeatedly refused to do, namely, to say that the wife has a vested present right to one half of the community property, even while her husband is alive. In pressing his thesis, the author has made too little of the difficulties which lie in its path, and has over-stated the principles which support his view.

The author's so-called five theories of the California community property law, it seems to this reviewer, are variations in terminology rather than distinct theories. They are: (1) Equal vested present interest theory; (2) Vested future interest theory; (3) Contingent future interest theory; (4) Non-interest theory (plain), and (5) Non-interest theory (compounded with heirship theory).

Considerable controversy has arisen since the decision of the United States Supreme Court in the now famous Robbins case as to whether that case would change the hitherto accepted Federal view that the wife's half-interest was not taxable under the estate tax (Wardell v. Blum, 267 Fed. 226). Mr. Burnett urges strenuously that the Robbins case should not affect the doctrine of Wardell v. Blum.

It should be noted, however, that the recent case of Talcott v. United States (C. C. A. 9th, Jan. 30, 1928) has decided that all of the property of the decedent acquired in California, including the wife's interest in community property, is subject to the Federal estate tax. The case expressly overrules Wardell v. Blum. The United States Circuit Court of Appeals felt that Wardell v. Blum could no longer be law in face of the decision in the Robbins case.

The court in the Talcott case also unwittingly refutes another theory of Mr. Burnett, namely, while agreeing that the interest of the wife in the community property is more than that of a mere heir, the court concludes that it does not necessarily follow that because of this, her interest is a present vested interest. In the case of dower, which right is more than that of an heir, under section 402 (b) of the Revenue Act of 1918, the dower right is taxable as part of the husband's property. (See comment on Talcott v. United States, 16 California Law Review 243.)

All in all, however, if one is willing to pay the rather high price asked for the brief, Mr. Burnett's monograph presents some interesting ideas and is well worth reading.